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8 **UNITED STATES DISTRICT COURT**
9 **FOR THE DISTRICT CALIFORNIA**
10 **CENTRAL DISTRICT**

11 CRAIG CUNNINGHAM,
12 Plaintiff,
13 vs.

Case No.: 8:18-cv-01093-AG-AGR

Honorable Andrew Guilford

14 PERFORMANCE SLC LLC,
15 PERFORMANCE SETTLEMENT LLC,
16 DANIEL J. CRENSHAW
17 Defendant

Magistrate Judge Honorable Alicia G.
Rosenburg

DEFENDANTS MEMORANDUM OF
CONTENTIONS OF FACTS AND LAW

19 Pursuant to Local Rule 16-4, defendants, PERFORMANCE SLC LLC,
20 PERFORMANCE SETTLEMENT LLC, and DANIEL J. CRENSHAW submit the
21 following Memorandum of Contentions of Law and Fact.
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1 **DEFENDANTS MEMORANDUM OF CONTENTIONS OF LAW AND FACT**
2 **LR 16-4.1 CLAIMS AND DEFENSES**

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4 **A. Summary of Claims**

5 **Claim 1: Violations of 47 U.S.C. 227(b):** Plaintiff alleges that Defendants
6 called him on his cell phone using an Automatic Telephone Dialing System
7 (“ATDS”) without his prior express consent.

8
9 **Claim 2: Violations of 47 U.S.C. 227 (c):** Plaintiff Alleges that he asked for
10 Defendants written do-not-call list and was not provided one.

11
12 **Claim 3: California’s Business and Professions Code 17200:** Plaintiff alleges
13 that Defendants actions in violating the TCPA also constitute violations of
14 California’s Unfair Competition Law.
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16 **B. Elements Required to Establish Plaintiff’s Claim**

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18 **Elements Required to Establish Claim 1**

- 19 1. Defendant called a cellular telephone number;
20 2. using an automatic telephone dialing system;
21 3. without the recipient's prior express consent.
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23 See Meyer v. Portfolio Recovery Assocs., LLC, 707 F.3d 1036, 1043 (9th Cir. 2012).

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25 **Elements Required to Establish Claim 2**

- 26 1. Plaintiff must prove that he has received more than one telephone call within
27 any 12 month period by or on behalf of the same entity
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1 2. In violation of any section of 47 U.S.C. 227, Or

2 3. Telephone solicitations to residential telephones who's subscriber has registered
3 his telephone number on the national do-not-call registry.
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5 See Heidorn v. BDD Mktg. & Mfg. Co., LLC, No. C-13-00229 JCS, 2013 WL
6 6571629, at *10 (N.D. Cal. Aug. 19, 2013); Drew v. Lexington Consumer Advocacy
7 LLC, No. 16-CV-00200-LB, 2016 WL 1559717, at *6 (N.D. Cal. Apr. 18, 2016).
8

9 **Elements Required to Establish Claim 3**

10 1. Plaintiffs must establish a loss or deprivation of money or property sufficient to
11 qualify as injury in fact, i.e., *economic injury*, and
12

13 2. Show that economic injury was the result of, i.e., *caused by*, the unfair business
14 practice or false advertising that is the gravamen of the claim.
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16 See Holt v. Facebook, Inc., 240 F. Supp. 3d 1021, 1035 (N.D. Cal. 2017).
17

18 **C. Key Evidence in Opposition to Each Claim**

19 **Claim 1: No ATDS was used**

20 The testimony of Defendants will show that only two types of calls were placed
21 to Defendant. In the first type of call, an agent sees a screen with a link to press of
22 Plaintiff's telephone number. If the agent chooses, and only if the agent chooses, the
23 agent may click the link and the telephone system will dial the number. The second
24 type of call made to Plaintiff by Defendant is a pure manual dial. That is, the agent
25 picks up the handset and dials the keypad with his or her fingers. Defendants will
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1 testify that no other type of call was made. Defendants will testify that the calling
2 system used by Defendants to contact Plaintiff was not programed or set up to make
3 any other type of call. Plaintiff has not designated an expert to suggest any different
4 type of call was made, or that the calling system used by Defendants was capable of
5 any other types of calls at the time the calls were placed.
6
7

8 **Claim 1: Prior Express Consent**

9 Even if the type of calling described above are considered calls with an ATDS,
10 although no precedent in the Ninth Circuit suggests such, the calls at issue were made
11 with the prior express consent of Plaintiff. On April 28, 2015, Plaintiff filled out an
12 application with Defendant Performance SLC, LLC, in which he provided the cell
13 phone number at issue (Exhibit 212). All calls subsequent to this were made with
14 Plaintiff's prior express consent because he provided his express consent when he
15 filled out the application.
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19 **Claim 2: No ATDS was Used and Plaintiff's Number is not on the National** 20 **Do not Call Registry.**

21
22 As discussed above, Defendants did not use an ATDS to make any of the calls at
23 issue. Furthermore, Plaintiff will testify that his number is not on the National Do Not
24 Call Registry. Since an ATDS was not used, Plaintiff cannot prove this claim.
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26 Furthermore, because his number is not on the National Do-Not-Call registry, he also
27 cannot prove Claim 2.
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Claim 3: Plaintiff's TCPA claim fails and He is not Charged for the Calls at Issue

Plaintiff's TCPA claim fails because he cannot show that an ATDS was used to make the calls at issue. Furthermore, even if Plaintiff could show that the calls at issue were made with an ATDS, he will testify that he pays a flat rate for each call to his cell phone. He does not have standing to bring this claim because he has not suffered any economic harm.

D. Affirmative Defenses

Defendants have pleaded the following affirmative Defenses (Dkt. No. 18)

1. Failure to state a claim

Plaintiff has failed to state a claim for which relief may be sought. He does not have any evidence that an ATDS was used and therefore, failed to state a claim for any of his alleged claims.

2. Prior express consent

Plaintiff provided Defendants with the number at issue when he filled out an application with defendants on April 28, 2015 (Exhibit 212).

3. Waiver, estoppel and unclean hands

Plaintiff has unclean hands, in that he does not come to the litigation with clean hands. He has admitted to lying to Defendants about his interest in pursuing their services and did so repeatedly.

1 4. Unjust enrichment

2 Plaintiff wishes to be enriched by \$1,500 a call for calls that he not only invited, but
3 that he did his best to encourage, he should not gain for statutory violations he himself
4 provoked.
5

6 5. Failure to mitigate

7 But for his lies to Defendant, Plaintiff would not have a claim for any statutory
8 damages. He never instructed Defendants not to call him, which would have ended the
9 calls, he continually encouraged them.
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11 6. Any violation was not a Willful or Knowing Violation

12 As noted, Plaintiff continually told Defendants he was interested in its services and
13 that he wanted to hire them. There is no showing that there was any intent on the part
14 of Defendants to violate the TCPA. Furthermore, the way in which Defendants made
15 the calls at issue, manually dialing the number, was not known to be a violation of the
16 TCPA and therefore, they could not have willfully or knowingly violated the TCPA.
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20 7. Plaintiff was not charge for calls

21 Since Plaintiff was not charged for the calls at issue, his claim for UCL fails as he has
22 not suffered any economic harm.
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1 8. Contribution

2 Plaintiff alleges that 117 calls came from Defendants. However, Defendants call logs
3 show significantly less calls to the number at issue, 49 (Exhibit 203). If Plaintiff
4 actually received these calls, they did not come from Defendants.
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6 9. Plaintiff Has Not Suffered Injury

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8 Plaintiff cannot show that he suffered damage as a result of the alleged calls.
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10 10. Plaintiff Lacks Standing to Bring his Claims

11 Plaintiff has not suffered any concrete harm because not only did he encourage the
12 calls, but he was not charged for them.
13

14 11. Intervening cause

15 Plaintiff alleges that 117 calls came from Defendants. However, Defendants call logs
16 show significantly less calls to the number at issue, 49 (Exhibit 203). If Plaintiff
17 actually received these calls, they did not come from Defendants.
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19 12. Reasonable practices

20 Defendants have always conducted their business within the industry standards used
21 for companies in this location operating similar business.
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23 13. Unknown Defenses

24 Defendants reserved the right to add affirmative defenses if such defenses became
25 known to them throughout this lawsuit. Defendants now pleads the affirmative
26 Defense of Statute of Limitations
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1 Statute of Limitations

2 Plaintiff's complaint only alleges violations starting on March 24, 2017. There
3 was no reason for Defendants to believe that Plaintiff intended to allege violations
4 before March 24, 2017. The allegations starting on March 24, 2017, are not time
5 barred. However, during pretrial conference meeting between the parties on July 11,
6 2019, Plaintiff told Defendants he would be alleging violations from as early as April,
7 2015. This was news to Plaintiffs. On April 26, 2019, Plaintiff sent an email to
8 Defendants stating that, unless they stipulate to allow Plaintiff the ability to include
9 time barred calls, they would file a separate lawsuit alleging violations of the calls
10 before March 24, 2017. Defendants did not so stipulate, and nothing was ever filed
11 alleging the time-barred calls at issue as violations of the TCPA. Now that Plaintiff has
12 made known his intent to bring time barred allegations against Defendants, they now
13 include such an affirmative defense.

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19 **E. Elements of Affirmative Defenses**

20 1. Failure to state a claim

21 As noted above, Plaintiff has failed to state a claim for which relief may be sought. He
22 does not have any evidence that an ATDS was used and therefore, failed to state a
23 claim for any of his alleged claims. In order to state a claim for violations of the
24 TCPA, Plaintiff must that the calls at issue were made by a device that has 1)the
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1 capacity 2) to dial stored numbers 3) automatically Marks v. Crunch San Diego, LLC,
2 904 F.3d 1041 (9th Cir. 2018)

3
4 2. Prior express consent

5 Plaintiff provided Defendants with the number at issue when he filled out an
6 application with defendants on April 28, 2015.

7
8 It has long been held in this circuit, by the FCC, and by district courts across the
9 country that, “persons who knowingly release their phone numbers have in effect given
10 their invitation or permission to be called at the number which they have given, absent
11 instructions to the contrary.” In re rules & Reg’s Implementing the Tel. Consumer
12 Prot. Act of 1991, 7 F.C.C.R. 8752, 8769 (Oct. 16, 1992).

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15 In accordance with the 1992 FCC Order supra, the vast majority of cases to
16 address the issue of consent have held that a telephone customer who provides her
17 number to another party consents to receive calls or texts from that party. See,
18 e.g., Van Patten, 22 F.Supp.3d at 1073–77; Baird v. Sabre Inc., 995 F.Supp.2d 1100,
19 1106 (C.D.Cal.2014); Emanuel v. L.A. Lakers, Inc., No. CV 12–9936–GW(SHx),
20 2013 WL 1719035 (C.D.Cal. Apr. 18, 2013); Roberts v. PayPal, Inc., No. C 12–0622
21 PJH, 2013 WL 2384242 (N.D.Cal. May 30, 2013); Olney v. Job.com, Inc., No. 1:12–
22 CV–01724–LJO, 2014 WL 1747674, at *5 (E.D.Cal. May 1, 2014); Pinkard v. Wal–
23 Mart, No. 3:12–cv–02902–CLS, 2012 WL 5511039, at *2 (N.D.Ala. Nov. 9,
24 2012); Murphy v. DCI Biologicals Orlando, LLC, No. 6:12–cv–1459–Orl–36KRS,
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2013 WL 6865772 (M.D.Fla. Dec. 31, 2013); Steinhoff v. Star Media Co., LLC, No. 13-cv-1750 (SRN/JSM), 2014 WL 1207804 (D.Minn. Mar. 24, 2014); Andersen v. Harris & Harris, No. 13-CV-867-JPS, 2014 WL 1600575 (E.D.Wis. Apr. 21, 2014).

3. Unclean hands

Plaintiff has unclean hands, in that he does not come to the litigation with clean hands. He has admitted to lying to Defendants about his interest in pursuing their services and did so repeatedly.

The “Defense of unclean hands arises from the maxim, ‘He who comes into Equity must come with clean hands.’” Kendall-Jackson Winery, Ltd. v. Superior Court, 76 Cal. App. 4th 970, 90 Cal. Rptr. 2d 743 (1999), as modified on denial of reh'g (Jan. 3, 2000). Although Unclean Hands is an equitable defense, it is also applied in the court of law. “Defense of unclean hands is available in legal as well as equitable actions. Id.” At the heart of the Unclean Hands defense is “Any conduct that violates conscience, or good faith, or other equitable standards of conduct is sufficient cause to invoke the doctrine of unclean hands.” Id.” The court in Kendall-Jackson laid out a three part test to determine if a plaintiff is coming to the action with Unclean Hands. “Whether the particular misconduct is a bar to the alleged claim for relief depends on (1) analogous case law, (2) the nature of the misconduct, and (3) the relationship of the misconduct to the claimed injuries. Id.” All three elements are present in this matter.

1 4. Unjust enrichment

2 As shown above, Plaintiff has unclean hands in bringing this lawsuit. “The elements of
3 an unjust enrichment claim are the receipt of a benefit and the unjust retention of the
4 benefit at the expense of another. Peterson v. Cellco P'ship, 164 Cal. App. 4th 1583, 80
5 Cal. Rptr. 3d 316 (2008). Plaintiff wishes to be enriched by \$1,500 a call for calls that
6 he not only invited, but that he did his best to encourage, he should not gain for
7 statutory violations he himself provoked.
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11 5. Failure to mitigate

12 As noted above, but for his lies to Defendant, Plaintiff would not have a claim for any
13 statutory damages. He never instructed Defendants not to call him, which would have
14 ended the calls, he continually encouraged them, and failed to mitigate that damage, by
15 encouraging it.
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18 6. Any violation was not a Willful or Knowing Violation

19 Neither the TCPA nor the FCC define the phrase “willfully or knowingly.” See
20 Sengenberger v. Credit Control Servs., Inc., No. 09C2796, 2010 WL 1791270, (N.D.
21 Ill. May 5, 2010), at *6. In this absence, courts have put forth a variety of standards
22 interpreting the statutory text. See, e.g., Lary v. Trinity Physician Fin. & Ins. Servs.,
23 780 F.3d 1101, 1107 (11th Cir.2015) (“The requirement of 'willful or knowing'
24 conduct requires the violator to know he was performing the conduct that violates the
25 statute.”); Trindade v. Reach Media Grp., LLC, No. 5:12-CV-04759-PSG, 2014 WL
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3572132, at *5 (N.D.Cal. July 18, 2014) (“Some courts have held that a defendant must know that the making of the call violates the TCPA, while others have held that a defendant need only know that the call is being made.”). The Court in Haysbert v. Navient Sols., Inc., No. CV 15-4144 PSG (EX), 2016 WL 890297, at *10 (C.D. Cal. Mar. 8, 2016) agreed with those that have held the statute requires a defendant to intend or know that it was performing each of the elements of a TCPA claim (i.e. that it was making a call, to a person who did not provide prior express consent, using an automated system). See Lary, 780 F.3d at 1107; Olney v. Progressive Cas. Ins. Co., 993 F.Supp.2d 1220, 1227 (S.D.Cal.2014).

7. Plaintiff was not Charged for Calls

Plaintiff was not charged for the calls at issue, and he will testify as such. Therefore, his claim for UCL fails as he has not suffered any economic harm. “Under California law, recipient of text messages from gym did not suffer any injury from text messages, and thus lacked standing to pursue unfair practices claim against gym, since recipient had unlimited texting plan, such that he was not charged individually for text messages at issue Van Patten v. Vertical Fitness Grp., LLC, 22 F. Supp. 3d 1069 (S.D. Cal. 2014), aff’d, 847 F.3d 1037 (9th Cir. 2017)

1 8. Contribution

2 As noted above, Plaintiff alleges that 117 calls came from Defendants. However,
3
4 Defendants call logs show significantly less calls to the number at issue, 49 (Exhibit
5 203). If Plaintiff actually received these calls, they did not come from Defendants.

6 9. Plaintiff Has Not Suffered Injury

7
8 The United States Supreme Court has held that “even in the context of a
9 statutory violation,” such as a violation of the TCPA, an injury must be “concrete” --
10 i.e., a litigant cannot “automatically” recover merely because “a statute grants [him] a
11 statutory right and purports to authorize [him] to sue to vindicate that right.” Spokeo,
12 Inc. v. Robins, 136 S. Ct. 1540, 1549 (2016).

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15 10. Plaintiff Does Not Have Standing to Bring his Claims

16 Applying Spokeo’s concrete injury requirement in the TCPA context, it has been
17
18 held that a litigant who takes affirmative steps to provoke or encourage violations does
19 not suffer any concrete, or actual, injury and therefore cannot recover. See Stoops v.
20 Wells Fargo Bank, N.A., 197 F. Supp. 3d 782, 797-99 (E.D. Pa. 2016) (“Plaintiff’s
21 interests, which include purchasing cell phones with the hope of receiving calls from
22 creditors for the sole purpose of collecting statutory damages, are not ‘among the sorts
23 of interests [the TCPA was] specifically designed to protect.’”).
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1 11. Intervening cause

2 Plaintiff alleges that 117 calls came from Defendants. However, Defendants call logs
3 show significantly less calls to the number at issue, 49 (Exhibit 203). If Plaintiff
4 actually received these calls, they did not come from Defendants.
5

6 12. Reasonable practices

7
8 Defendants have always conducted their business within the industry standards used
9 for companies in this location operating similar business. As such, if any violations did
10 occur, they were done with procedures in place to avoid such violations. Defendants
11 will make a showing that such violations could not have been willful or knowing, as
12 discussed above.
13

14 13. Statute of Limitations

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16 As Noted above and in its Answer to compliant (Dkt. 18), Defendants reserved the
17 right to supplement additional affirmative defenses as they become known to
18 Defendants. Defendants were not aware of Plaintiff's intent to claim time-barred
19 violations until July 11, 2019. Therefore, Defendants will argue that any violation
20 occurring after the allegations in the complaint, March 24, 2017, are time barred by the
21 statute of limitations. "Except as otherwise provided by law, a civil action arising
22 under an Act of Congress enacted after the date of the enactment of this section may
23 not be commenced later than 4 years after the cause of action accrues." 28 U.S.C.A. §
24 1658 (West). Any new allegation that allegedly occurred four years before Defendants
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1 were on notice that such allegations existed, are time bared and should not be allowed
2 to be heard.

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4 **F. Description of Key Evidence Relied on for Affirmative Defenses**

5 1. Failure to state a claim

6 As noted above, Plaintiff has failed to state a claim for which relief may be sought. He
7 does not have any evidence that an ATDS was used and therefore, failed to state a
8 claim for any of his alleged claims. In order to state a claim for violations of the
9 TCPA, Plaintiff must that the calls at issue were made by a device that has 1)the
10 capacity 2) to dial stored numbers 3) automatically Marks v. Crunch San Diego, LLC,
11 904 F.3d 1041 (9th Cir. 2018), something he cannot do as the calls were not made in
12 an automatic fashion, but with humans manually making the call, either by clicking on
13 a link to make the call, or manually dialing each number to call.
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17 2. Prior express consent

18 Plaintiff provided Defendants with the number at issue when he filled out an
19 application with defendants on April 28, 2015.
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21
22 There is no dispute between the parties that Plaintiff gave SLC the cell phone
23 number at issue when filling out an application with SLC for its services over the
24 phone (Exhibit 212). While Cunningham's purpose in gratuitously giving his phone
25 number to SLC may have been to set up a lawsuit, the practical effect was he gave
26 SLC permission to call him. It has long been held in this circuit, by the FCC, and by
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1 district courts across the country that, “persons who knowingly release their phone
 2 numbers have in effect given their invitation or permission to be called at the number
 3 which they have given, absent instructions to the contrary.” In re rules & Reg’s
 4 Implementing the Tel. Consumer Prot. Act of 1991, 7 F.C.C.R. 8752, 8769 (Oct. 16,
 5 1992).
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7
 8 In accordance with the 1992 FCC Order supra, the vast majority of cases to
 9 address the issue of consent have held that a telephone customer who provides her
 10 number to another party consents to receive calls or texts from that party. See,
 11 e.g., Van Patten, 22 F.Supp.3d at 1073–77; Baird v. Sabre Inc., 995 F.Supp.2d 1100,
 12 1106 (C.D.Cal.2014); Emanuel v. L.A. Lakers, Inc., No. CV 12–9936–GW(SHx),
 13 2013 WL 1719035 (C.D.Cal. Apr. 18, 2013); Roberts v. PayPal, Inc., No. C 12–0622
 14 PJH, 2013 WL 2384242 (N.D.Cal. May 30, 2013); Olney v. Job.com, Inc., No. 1:12–
 15 CV–01724–LJO, 2014 WL 1747674, at *5 (E.D.Cal. May 1, 2014); Pinkard v. Wal–
 16 Mart, No. 3:12–cv–02902–CLS, 2012 WL 5511039, at *2 (N.D.Ala. Nov. 9,
 17 2012); Murphy v. DCI Biologicals Orlando, LLC, No. 6:12–cv–1459–Orl–36KRS,
 18 2013 WL 6865772 (M.D.Fla. Dec. 31, 2013); Steinhoff v. Star Media Co., LLC, No.
 19 13–cv–1750 (SRN/JSM), 2014 WL 1207804 (D.Minn. Mar. 24, 2014); Andersen v.
 20 Harris & Harris, No. 13–CV–867–JPS, 2014 WL 1600575 (E.D.Wis. Apr. 21, 2014).
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22 The Ninth Circuit in Van Patten made it clear that express consent is established
 23 by providing a cell phone number on an application. “There is no dispute here that Van
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Patten never actually said to Vertical Fitness, ‘Yes, you may text me at the number I have given you,’ or anything like that. He never signed his name or initialed next to a disclaimer that by providing his phone number to Vertical Fitness he was welcoming text messages. As the Court said above, when Van Patten joined the Gold's Gym, the subject of text messages never came up. (Berggren Dep. at 69:12–15; 70:7–9.) Van Patten simply provided his phone number on an application card with no discussion of why Gold's Gym needed it or what they would do with it.” Van Patten v. Vertical Fitness Grp., LLC, 22 F. Supp. 3d 1069, 1073 (S.D. Cal. 2014), aff'd, 847 F.3d 1037 (9th Cir. 2017).

3. Unclean hands

Plaintiff has unclean hands, in that he does not come to the litigation with clean hands. He has admitted to lying to Defendants about his interest in pursuing their services and did so repeatedly.

The “Defense of unclean hands arises from the maxim, ‘He who comes into Equity must come with clean hands.’” Kendall-Jackson Winery, Ltd. v. Superior Court, 76 Cal. App. 4th 970, 90 Cal. Rptr. 2d 743 (1999), as modified on denial of reh'g (Jan. 3, 2000). Although Unclean Hands is an equitable defense, it is also applied in the court of law. “Defense of unclean hands is available in legal as well as equitable actions. Id.” At the heart of the Unclean Hands defense is “Any conduct that violates conscience, or good faith, or other equitable standards of conduct is sufficient cause to

1 invoke the doctrine of unclean hands.” Id.” The court in Kendall-Jackson laid out a
 2 three part test to determine if a plaintiff is coming to the action with Unclean Hands.
 3
 4 “Whether the particular misconduct is a bar to the alleged claim for relief depends on
 5 (1) analogous case law, (2) the nature of the misconduct, and (3) the relationship of the
 6 misconduct to the claimed injuries. Id.” All three elements are present in this matter.
 7

8 Analogous Case Law

9 Relevant to Cunningham, the United States Supreme Court has held that “even
 10 in the context of a statutory violation,” such as a violation of the TCPA, an injury must
 11 be “concrete” -- i.e., a litigant cannot “automatically” recover merely because “a
 12 statute grants [him] a statutory right and purports to authorize [him] to sue to vindicate
 13 that right.” Spokeo, Inc. v. Robins, 136 S. Ct. 1540, 1549 (2016). Pursuant to Spokeo,
 14 Cunningham cannot maintain his TCPA claim against Defendants unless he has
 15 suffered some concrete injury or actual harm as a result of each and every allegedly
 16 violative call at issue. Id. at 1547.
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21 Applying Spokeo’s concrete injury requirement in the TCPA context, it has been
 22 held that a litigant who takes affirmative steps to provoke or encourage violations does
 23 not suffer any concrete, or actual, injury and therefore cannot recover. See Stoops v.
 24 Wells Fargo Bank, N.A., 197 F. Supp. 3d 782, 797-99 (E.D. Pa. 2016) (“Plaintiff’s
 25 interests, which include purchasing cell phones with the hope of receiving calls from
 26 creditors for the sole purpose of collecting statutory damages, are not ‘among the sorts
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1 of interests [the TCPA was] specifically designed to protect.”); Clapper v. Amnesty
 2 Int'l USA, 133 S. Ct. 1138, 1143, 1151, 185 L. Ed. 2d 264 (2013) (finding that
 3 “Respondents' contention that they have standing because they incurred certain costs
 4 as a reasonable reaction to a risk of harm is unavailing--because the harm respondents
 5 seek to avoid is not certainly impending" and holding that "respondents cannot
 6 manufacture standing merely by inflicting harm on themselves based on their fears of
 7 hypothetical future harm that is not certainly impending”); Leyse v. Bank of Am. Nat'l
 8 Ass'n, 804 F.3d 316, 323 (3d Cir. 2015) (explaining that "only certain plaintiffs will
 9 have suffered the particularized injury required to maintain an action in federal court
 10 for a [TCPA] violation" and that “[s]omeone with a generalized interest in punishing
 11 telemarketers, for example, would not qualify on that basis alone”). Like Stoops
 12 Cunningham possess multiple cell phones that he will testify at during trial.

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 18 Mr. Cunningham intended to set-up the instant lawsuit as a way to make money.
 19 Thus, Mr. Cunningham did not suffer the type of harm that the TCPA was designed to
 20 prevent. Namely, Mr. Cunningham’s privacy interests were not violated when he
 21 received calls from Defendants because he had invited these calls, in order to try to
 22 bring this lawsuit. In other words, Cunningham did not suffer the exact harm that
 23 Congress wanted to eliminate with the TCPA (to protect consumers from unwanted,
 24 intrusive telephone calls), because Mr. Cunningham wanted Defendants to call his cell
 25 phone. Accordingly, Mr. Cunningham fails to establish an injury-in-fact as to each and
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1 every allegedly violative call because those purported injuries are premised upon a
2 bare statutory violation for which there was no actual harm.

3
4 Cunningham lied to SLC when he told it he was interested in its services on
5 April 28, 2015 (Exhibit 214), and he will testify to as much at trial. Cunningham lied
6 to SLC when he filled out an application with SLC and provided a fake bank account
7 number (Exhibit 214). But for these lies, SLC would not have made any calls to
8 Cunningham after April 28, 2015, and Defendants will testify to such. The April 28,
9 2015, call is not alleged as a violation of the TCPA in this lawsuit and is therefore not
10 at issue here (Dkt. 1). Cunningham cannot argue that he was harmed by the calls that
11 he invited with his lies. Further evidence that Cunningham is inviting these calls is the
12 fact that he possesses three cell phones for personal use, something he will testify to.
13
14 However, having three cell phones for personal use makes no sense from a logistical
15 stand point. More likely, Cunningham has three cell phones in order to collect calls
16 and file lawsuits, similar to the plaintiff in Stoops. While Cunningham might not hide
17 his cell phones in a shoebox, the outcome is essentially the same. With more phones in
18 his possession comes more phone numbers. With more phone numbers comes more
19 calls, and with more calls comes more lawsuits, over 150 lawsuits in filed in federal
20 court alone, something testified to by Cunningham during his deposition. Cunningham
21 invited the calls at issue not only by possessing multiple phones for the purpose of
22 collecting calls, but more importantly, by lying to SLC to induce more calls. Without
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1 his lies, Cunningham would not have received any calls from SLC, and this lawsuit
2 would not have been filed. Cunningham wanted the calls to come to his cell phone.
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4 Because he wanted the calls, there is no reason for congress to protect him from the
5 calls. Therefore, under analogous caselaw, Cunningham could not bring his claim for
6 violations of the TCPA.
7

8 Nature of Misconduct

9 As discussed above, Cunningham was not honest with SLC from the beginning.
10
11 He has testified that he gave the wrong information to SLC, and feigned interest in
12 SLC's services in order to get information about SLC. He has testified that if he told
13 them he was going to sue them for breaking the law he would not be able get the
14 information he required to bring his lawsuit against them. This testimony does not hold
15 weight in light of the facts of this case. If Cunningham only wanted information from
16 Defendants in order to bring this law, he had all the information he needed after the
17 April 28, 2015 conversation, in the form of an email with his application (Exhibit 212).
18
19

20 Cunningham's explanation that he was seeking information to bring a lawsuit
21 and punish Defendants for violations of the law does not explain why he continued to
22 lie to and mislead SLC for over two years after he had the information he needed. A
23 more likely explanation is that Cunningham intended to collect calls that he invited in
24 order to drive up the number of violations he could allege. In other words, the nature of
25 Cunningham's misconduct was to lie and to deceive SLC in order to collect a big
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1 paycheck for himself. This is not the type of behavior that congress meant to protect
2 from in enacting the TCPA. Cunningham meets the second prong of the Unclean
3 Hands test.
4

5 The Nature of the Misconduct to the Claimed Injuries.

6
7 “The final prong of the [Unclean Hands] test requires examination of the
8 relationship between the plaintiff's misconduct and the claimed injuries. (*Blain*,
9 *supra*, 222 Cal.App.3d at p. 1060, 272 Cal.Rptr. 250.) The misconduct that brings the
10 unclean hands doctrine into play must relate directly to the transaction concerning
11 which the complaint is made. It must infect the cause of action involved and affect the
12 equitable relations between the litigants.” *Id* at 76. There is no question that
13 Cunningham’s misconduct of deceiving SLC into believing he was interested in its
14 services is directly related to this action. As discussed above, the first call to
15 Cunningham on April 28, 2015, is not at issue in this lawsuit. In fact, none of the calls
16 placed in 2015 or 2016 are at issue in this lawsuit (Dkt. 1). However, it was during
17 those calls that Cunningham expressed his interest in using SLC’s services. It is also
18 during those calls that Cunningham received all the information he needed to bring a
19 lawsuit. Instead, he continued to deceive SLC stating he was interested in its services.
20 As SLC continued to make follow up calls to Cunningham to complete his application
21 he continued to count the calls, and tell them he was still interested. Every lie equated
22 to more calls, more calls equates to more alleged violations and a potentially bigger
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1 payout for Cunningham. Cunningham's claimed injuries are a direct result of his
2 deceit. Therefore, he meets the final prong of the Unclean Hands Test.

3
4 Cunningham meets all three prongs of the Unclean Hands test and therefore, it
5 should be ruled that he came to this action with unclean hands, and therefore, he
6 should not be able to continue this lawsuit with unclean hands.
7

8 4. Unjust enrichment

9 As shown above, Plaintiff has unclean hands in bringing this lawsuit. "The elements of
10 an unjust enrichment claim are the receipt of a benefit and the unjust retention of the
11 benefit at the expense of another. Peterson v. Cellco P'ship, 164 Cal. App. 4th 1583, 80
12 Cal. Rptr. 3d 316 (2008). Plaintiff wishes to be enriched by \$1,500 a call for calls that
13 he not only invited, but that he did his best to encourage, he should not gain for
14 statutory violations he himself provoked.
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17 5. Failure to mitigate

18 As noted above, but for his lies to Defendant, Plaintiff would not have a claim for any
19 statutory damages. He never instructed Defendants not to call him, which would have
20 ended the calls, he continually encouraged them, and failed to mitigate that damage, by
21 encouraging it.
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23

24 6. Any violation was not a Willful or Knowing Violation

25 Neither the TCPA nor the FCC define the phrase "willfully or knowingly." See
26 Sengenberger v. Credit Control Servs., Inc., No. 09C2796, 2010 WL 1791270, (N.D.
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1 Ill. May 5, 2010), at *6. In this absence, courts have put forth a variety of standards
2 interpreting the statutory text. See, e.g., Lary v. Trinity Physician Fin. & Ins. Servs.,
3 780 F.3d 1101, 1107 (11th Cir.2015) (“The requirement of ‘willful or knowing’
4 conduct requires the violator to know he was performing the conduct that violates the
5 statute.”); Trindade v. Reach Media Grp., LLC, No. 5:12–CV–04759–PSG, 2014 WL
6 3572132, at *5 (N.D.Cal. July 18, 2014) (“Some courts have held that a defendant
7 must know that the making of the call violates the TCPA, while others have held that a
8 defendant need only know that the call is being made.”). The Court in Haysbert v.
9 Navient Sols., Inc., No. CV 15-4144 PSG (EX), 2016 WL 890297, at *10 (C.D. Cal.
10 Mar. 8, 2016) agreed with those that have held the statute requires a defendant to
11 intend or know that it was performing each of the elements of a TCPA claim (i.e. that
12 it was making a call, to a person who did not provide prior express consent, using an
13 automated system). See Lary, 780 F.3d at 1107; Olney v. Progressive Cas. Ins. Co.,
14 993 F.Supp.2d 1220, 1227 (S.D.Cal.2014). Defendants will testify that each call was
15 made manually to Plaintiff, that is, that the call was either dialed by an agent either
16 clicking on link on his computer screen, or by picking up a handset and dialing
17 Plaintiff’s number each individual key at a time. If this type of dialing is somehow
18 ruled to be an ATDS, it cannot be ruled to be a knowing violation, as defendants did
19 not know they were using an ATDS.
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1 7. Plaintiff was not Charged for Calls

2 Plaintiff was not charged for the calls at issue, and he will testify as such. Therefore,
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4 his claim for UCL fails as he has not suffered any economic harm. “Under California
5 law, recipient of text messages from gym did not suffer any injury from text messages,
6 and thus lacked standing to pursue unfair practices claim against gym, since recipient
7 had unlimited texting plan, such that he was not charged individually for text messages
8 at issue Van Patten v. Vertical Fitness Grp., LLC, 22 F. Supp. 3d 1069 (S.D. Cal.
9
10 2014), aff’d, 847 F.3d 1037 (9th Cir. 2017)

11
12 8. Contribution

13 As noted above, Plaintiff alleges that 117 calls came from Defendants. However,
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15 Defendants call logs show significantly less calls to the number at issue, 49 (Exhibit
16 203). If Plaintiff actually received these calls, they did not come from Defendants.

17
18 9. Plaintiff Has Not Suffered Injury

19 The United States Supreme Court has held that “even in the context of a
20 statutory violation,” such as a violation of the TCPA, an injury must be “concrete” --
21
22 i.e., a litigant cannot “automatically” recover merely because “a statute grants [him] a
23 statutory right and purports to authorize [him] to sue to vindicate that right.” Spokeo,
24 Inc. v. Robins, 136 S. Ct. 1540, 1549 (2016). Pursuant to Spokeo, Mr. Cunningham
25 cannot maintain his TCPA claim against Defendants unless he has suffered some
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1 concrete injury or actual harm as a result of each and every allegedly violative call at
 2 issue. Id. at 1547.

3
 4 10. Plaintiff Does Not Have Standing to Bring his Claims

5 Applying Spokeo's concrete injury requirement in the TCPA context, it has been
 6 held that a litigant who takes affirmative steps to provoke or encourage violations does
 7 not suffer any concrete, or actual, injury and therefore cannot recover. See Stoops v.
 8 Wells Fargo Bank, N.A., 197 F. Supp. 3d 782, 797-99 (E.D. Pa. 2016) ("Plaintiff's
 9 interests, which include purchasing cell phones with the hope of receiving calls from
 10 creditors for the sole purpose of collecting statutory damages, are not 'among the sorts
 11 of interests [the TCPA was] specifically designed to protect.'"); Clapper v. Amnesty
 12 Int'l USA, 133 S. Ct. 1138, 1143, 1151, 185 L. Ed. 2d 264 (2013) (finding that
 13 "Respondents' contention that they have standing because they incurred certain costs
 14 as a reasonable reaction to a risk of harm is unavailing--because the harm respondents
 15 seek to avoid is not certainly impending" and holding that "respondents cannot
 16 manufacture standing merely by inflicting harm on themselves based on their fears of
 17 hypothetical future harm that is not certainly impending"); Leyse v. Bank of Am. Nat'l
 18 Ass'n, 804 F.3d 316, 323 (3d Cir. 2015) (explaining that "only certain plaintiffs will
 19 have suffered the particularized injury required to maintain an action in federal court
 20 for a [TCPA] violation" and that "[s]omeone with a generalized interest in punishing
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1 telemarketers, for example, would not qualify on that basis alone”). Like Stoops
2 Cunningham possess multiple cell phones that he will testify at during trial.

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4 11. Intervening cause

5 Plaintiff alleges that 117 calls came from Defendants. However, Defendants call logs
6 show significantly less calls to the number at issue, 49 (Exhibit 203). If Plaintiff
7 actually received these calls, they did not come from Defendants.
8

9 12. Reasonable practices

10 Defendants have always conducted their business within the industry standards used
11 for companies in this location operating similar business. As such, if any violations did
12 occur, they were done with procedures in place to avoid such violations. Defendants
13 will make a showing that such violations could not have been willful or knowing, as
14 discussed above.
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17 13. Statute of Limitations

18 As Noted above and in its Answer to compliant (Dkt. 18), Defendants reserved the
19 right to supplement additional affirmative defenses as they become known to
20 Defendants. Defendants were not aware of Plaintiff’s intent to claim time-barred
21 violations until July 11, 2019. Therefore, Defendants will argue that any violation
22 occurring after the allegations in the complaint, March 24, 2017, are time barred by the
23 statute of limitations. “Except as otherwise provided by law, a civil action arising
24 under an Act of Congress enacted after the date of the enactment of this section may
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1 not be commenced later than 4 years after the cause of action accrues.” 28 U.S.C.A. §
2 1658 (West). Any new allegation that allegedly occurred four years before Defendants
3 were on notice that such allegations existed, are time bared and should not be allowed
4 to be heard.
5

6 **G. Third Parties**

7
8 There are no third parties in this action.

9 **H. Evidentiary Issues**

10
11 Defendants intend to move the court to exclude attorney work product that was
12 inadvertently produced during discovery. The work product at issue is a call log of
13 Defendants calls to Plaintiff. On the far right side of the call log is a “notes” column.
14
15 The top of the call log states “Work Product.” The work product was created by adding
16 the attorney’s mental impressions of each call at issue in the “notes” column. The
17 Ninth Circuit has ruled “no showing of relevance, substantial need or undue hardship
18 should justify compelled disclosure of an attorney's mental impressions, conclusions,
19 opinions or legal theories. This is made clear by the Rule's use of the term ‘shall’ as
20 opposed to ‘may.’” Holmgren v. State Farm Mut. Auto. Ins. Co., 976 F.2d 573, 577
21 (9th Cir. 1992). Defendants discovered that this work product was produced to
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23 Plaintiff and immediately notified Plaintiff of this. Defendants will propose that the
24 work product be supplemented with the same document that does not contain the
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26 “notes” column.
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1 **I. Issues of Law**

2 **Capacity**

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4 The Ninth Circuit has not ruled on what constitutes capacity since the D.C.
5 Circuit overruled the FCC's 2015 order regarding the definition of capacity in ACA
6 Int'l v. Fed. Commc'ns Comm'n, 885 F.3d 687, 702–03 (D.C. Cir. 2018). However, the
7 Second Circuit has spoken directly to the definition of capacity post ACA in King v.
8 Time Warner Cable Inc., No. 15-2474-CV, 2018 WL 3188716, at *7 (2d Cir. June 29,
9 2018), and its reasoning is sound:

12 In sum, we conclude that the term ‘capacity’ in the TCPA’s
13 definition of a qualifying autodialer should be interpreted to refer to a
14 device’s current functions, absent any modifications to the device’s
15 hardware or software. That definition does not include every smartphone
16 or computer that might be turned into an autodialer if properly
17 reprogrammed, but does include devices whose autodialing features can
18 be activated, as the D.C. Circuit suggested, by the equivalent of ‘the
19 simple flipping of a switch.’ Within those bounds, however, courts may
20 need to investigate, on a case-by-case basis, how much is needed to
21 activate a device’s autodialing potential in order to determine whether it
22 violates the TCPA.

21 King v. Time Warner Cable Inc., No. 15-2474-CV, 2018 WL 3188716, at *7 (2d Cir.
22 June 29, 2018). Defendants request that this court adopt the Second Circuit’s definition
23 of capacity as a factual issue related to how much is needed to activate a device’s
24 autodialing potential.
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1 **LR 16-4.3 BIFURCATION OF ISSUES**

2 Defendants do not request bifurcation of issues

3
4 **LR 16-4.4 JURY TRIAL**

5 Plaintiff timely requested a Jury Trial with his complaint (Dkt. 1).

6
7 **LR 16-4.5 ATTORNEYS' FEES**

8 Defendants have made a rule 68 offer of judgment. If the applicable, Defendants will
9 seek to move the court of an award of costs. "If the judgment that the offeree finally
10 obtains is not more favorable than the unaccepted offer, the offeree must pay the costs
11 incurred after the offer was made." Fed. R. Civ. P. 68. If applicable as costs,
12 Defendants will seek fees incurred after the offer was rejected.

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15 **LR 16-4.6 ABANDONMENT OF ISSUES**

16 Neither Party has abandoned any claim or defense.

17
18 Dated: July 15, 2019

19
20
21 **Law Offices of Jeffrey Lohman P.C.**

22 */s/ Jeremy Branch*
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